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SOME SOCIETAL ASPECTS OF THE CRIMINAL LAW*

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Crime is a social product and a social occurrence.¹ No act is a criminal act until it threatens harm or the possibility of harm to organized society and organized society has taken steps to prevent the recurrence of that act.² A criminal is one who acts in such a way that organized society, in the form of the community of which he is a part, is compelled to declare that the act and the actual or potential consequences of that act are a menace or injury to it, and is forced to take steps to suppress further activities of his along similar lines.

Organized society is a complex thing. A nation, a state, a community, has many factors within it and many functions to perform. The criminal may injure these factors or interfere with these functions. The criminal law therefore must analyze the social organization, determine how the criminal is related to and connected with this organization, and then devise the best means for protecting the organization from the danger with which the criminal threatens it. The three-fold function of the criminal law is constant no matter how much or how often the social organization may change in character. That the analysis at a given time may reveal that the criminal is related to society in a way that is different from that of a preceding age or decade, and that existent protective means are ineffective, does not relieve those who are responsible for the creation and administration

*This article is by way of furnishing a background for a series of articles dealing with our substantive criminal law which series is now in preparation. My purpose is to avoid the constant repetition of some fundamental principles which will be taken for granted in subsequent articles.

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¹*Ferri*, The Reform of Penal Law in Italy, *Journal of Criminal Law and Criminology*, Vol. 12, page 178. *Saleilles*, The Individualization of Punishment, page 4, page 93, page 103, page 90. *Ferri*, Criminal Sociology, par. 48. *Tarde*, Penal Philosophy, par. 79.

In general it can be said that modern criminology is sociological. The continental writers lay their emphasis upon divergent social factors. The Italians are stressing the anthropological aspects, the French the sociological, and the Germans the psychological. (References in the main to these continental writers and their writings are references to translations of their works in *The Modern Criminal Science Series*, and *The Continental Legal Science Series*, published by Little, Brown & Co.)

²*Saleilles*, Individualization of Punishment, par. 18; *ibid.* par. 2.

of the criminal law from their duty to keep the criminal law in such condition that it can fulfill its function. Protective measures must keep abreast of the organization which is to be protected and the ever-increasing and new sources of danger. A changing organization cannot be protected adequately by a rigid and unchanging protective system. A constant watch, therefore, must be kept upon the social organization so that the protective means will be adapted to the social needs. It is the purpose of this article to indicate to which of the factors of our modern social organization the criminal is related, and how he is connected with them.

So far as the criminal law is concerned the criminal is related to the general social organization of which he is a part, to the individuals who are governed by that social organization, and to the organized procedure and legal agencies which the social organization has created as a means for meeting its needs and conserving its interests. This last we ordinarily call the State. The state has a twofold function: first, it must secure itself from destruction, so that it can function for the protection of the society which has created it; and secondly, it must secure protection to the individuals in that society.³ So that, as the criminal is a member of the social organization, it is the function of the state to protect him as well as the other individuals so far as the acts of the criminal will permit such protection to be afforded when the general security of the whole organization is considered and secured.^{3a} The criminal is therefore related to the state in a twofold way. He threatens the security of the state, but at the same time he is entitled to protection from the state. That is, the individual interest of the criminal must be conserved so far as it is possible to conserve them and at the same time protect the individual interests of the other members of the social organization and the interests of the state, both as a juristic person and as the guardian of the social interests.^{3b} It is the determining and balancing of these interests which is the fundamental problem of the criminal law.^{3c} This problem has its nexus in the criminal, his acts and the consequences of these acts.

The first question, then is this: Is the criminal himself a menace

³Judge Marcus A. Kavanaugh, *The Adjustment of Penalties*, 7 Amer. Bar Asso. Jour., 401. Ferri, *Criminal Sociology*, Part 3. Saleilles, *Individualization of Punishment*, par. 2.

^{3a}Saleilles, *ibid.* page 8, Cf. Ross, *Social Control*, Ch. XI, page 106 seq.

^{3b}Pound, *Lectures on Jurisprudence*, 3rd Ed., page 82; Holland, *Jurisprudence*, 11th Ed., page 372 et seq.

^{3c}Pound, *The Future of the Criminal Law*, XXI Columbia Law Rev. 1.

ical structure such that his very existence is a danger to the community? For example: X is accused of arson. Entirely aside from the to the social organization?^{3d} That is, is his physiological or psychological fact that he did set fire to Y's barn, and this led to a conflagration which wiped out an entire village, is the question as to whether X is a pyromaniac or not. If he is, one method of control of his future activities must be adopted; if he is not, then another and different method should be followed. That society is to be protected is true. But the means whereby it is to be protected cannot be determined a priori. If the pyromania is the result of an Oedipus complex, suggestion through hypnosis may remove the dangerous character of the accused. But if it is the outcome of bone pressure upon the brain, caused by the accused being dropped in infancy through the carelessness of a nurse, psycho-analysis would be useless, but a surgical operation might prove effective.

The pyromaniac is, probably, abnormal. But the normal mental ideas, ideals and habits of the accused, even if he has committed a criminal act are of concern. The individual who generally patterns his life upon the Sermon on the Mount is less of a potential danger to the community than the individual who gives his allegiance to the "eye for an eye and tooth for a tooth" theory of the Lex Talionis as expressed in Deuteronomy. The man who kills another in hot blood and under great provocation, but normally believes that killing is inexcusable, is different from the gangster who believes that loyalty to the gang outweighs the value of human life, and so kills in cold blood the member of the gang who has betrayed its secrets.⁴ The former needs to control his temper and the latter to renovate his ideals. Protection from the former comes through strengthening the will power of the accused; protection from the latter comes through the inculcation of higher ideals. The mental characteristics of the accused indicate the nature and extent of the peril he represents.⁵ They must be known before the state can protect society from that peril.

The personality⁶ and the social, economic and political position of the accused are to be considered.⁷ The boast of the common law is

^{3d}*Saleilles*, Individualization of Punishment, par. 18; *ibid.* par. 40.

⁴*Lombroso*, Crime, Its Causes and Remedies, page 214 (quoting Onofrio).

⁵*Lombroso*, *ibid.* page 105 seq. *Ferri*, The Reform of Penal Law in Italy, *supra*, page 189.

⁶*Lombroso*, *ibid. supra*, page 214. *Ross*, Social Control, Ch. XXI.

⁷*Ferri*, Reform of Penal Law in Italy, *supra*, page 192. *Lombroso*, Crime, Its Causes and Remedies, page 132. Cf. with the Chapter on Religion, page 138. *Bonger*, Criminality and Economic Conditions, 247-321, 546-609.

that it is no respecter of persons. The boast should be a reproach. The leader in a community who takes the law into his own hands is a greater danger to the community than the one who cannot influence the actions of other members of the community. His act, his way of thinking, begets emulation. The greater his prestige, the more powerful his personality, the more dire will be the consequences of his lawless acts.⁸ When an ex-convict accuses his parish priest of stealing it is not similar to the parish priest accusing the ex-convict of stealing. The social effect is different. Similarly, when a tramp assaults and rapes a young girl it is not the same thing as when the superintendent of a girl's reformatory rapes a young inmate of the reformatory. The social shock, for good or ill, is greater when a person of high position or repute acts in criminal fashion. The power of suggestion exercised by a person of prominence is greater than the power of suggestion exercised by a person of no political or social importance.⁹ And as the criminal law is interested in protecting society from all forms of danger, this form of danger must also be guarded against, and to be guarded against it needs to be considered.

Furthermore, the economic conditions which have aided in producing the criminal tendencies or the criminal act must be studied. For the surest protection against criminal acts and the existence of criminals comes from eradicating the causes which breed criminals and tend to produce criminal activities.¹⁰

From another angle the economic conditions of the criminal are important. The effect upon society determines whether society wishes to be protected or not. Criminal law cannot be effective unless it has behind it the support of the social conscience. But the social conscience may not be touched adversely when one man commits an act of depredation, and it may be thus aroused when another man commits a similar act.^{10a} For example: X breaks into a bakeshop and steals a loaf of bread. If X is poor and starving and the punishment for such stealing is severe, the strong tendency of society would be to allow the need of the accused to override any punishment which might have been imposed by law. But if the stealing were done by one who had ample means of support and who had no need to steal at all, the social conscience might demand the full execution of the penalty. So that the

⁸*Lombroso*, Crime, etc., page 232.

⁹*Lombroso*, *ibid.*

¹⁰*Tarde*, Penal Philosophy, page 77. *Ferri*, Penal Reform in Italy, XII Jour. of Criminal Law and Criminology, 178, 185. *Lombroso*, Crime, Its Cause and Remedies, Chapter IX.

^{10a}*Saleilles*, par. 33, Individualization of Punishment.

treatment of the criminal, which treatment is a part of the protective system, depends to some extent upon his economic situation and needs, and these are, therefore, of great importance to the criminal law.

The treatment of the criminal is, in a modern civilized legal system, either deterrent or reformative. In former times the vindictive attitude was no doubt present and even predominant in the legal system which treated of crime and criminals, but that savage attitude has, fortunately, at least in theory, been superseded by a more thoughtful and humane point of view.¹¹

The deterrent method of treatment is designed to prevent the recurrence of the criminal act on the part of the criminal and also on the part of other members of society who might feel the impulsion to act as the criminal did. The deterrence of the criminal is immediate. His body suffers any pain which the treatment entails; the coercion upon his mind is direct; he experiences in his own person the hurtful sensations, a knowledge of which is relied upon to prevent future criminal activities. But the deterrence of the other individuals in society is indirect. All that they can experience actually is a knowledge that a certain act performed by the criminal was followed by certain other acts performed by the guardians of the social organization, which acts are supposed to be hurtful to the criminal. But the hurtfulness is not experienced by the other members of society. They can only *imagine* what the hurtfulness is like. If the individual has a vivid imagination, then the suffering of the criminal, if any exists and is made manifest, may leave a strong impression upon his mind and thus deter any criminal activity in which he might feel impelled to engage. But if imaginative qualities are lacking in that individual, then the deterrent effect of the treatment meted out to the criminal may be slight or non-existent. Furthermore, if the mind of the average individual in a given society reacts adversely to the treatment given to the criminal, that is, the individual feels that the hurtfulness of the treatment is out of all proportion to the act committed so that his indignation is aroused not against the act of the criminal but against the acts of the social guardian, the deterrent effect of the treatment never comes into play.^{11a} For the imaginative participation, of the one to be deterred, in the suffering of the criminal becomes so keen as to arouse the instinct of self-defense which promptly allies itself with the criminal and against the guardian for the purpose of beating down or circumventing the guardian. This defensive reaction may be so rapid as

¹¹ *Saleilles*, Individualization of Punishment, par. 11, par. 20.

^{11a} *Ibid.* par. 33.

to give the impression that the individuals have been shocked into action without experiencing any imaginative suffering at all. This will probably be true of those individuals who are lacking in imaginative intensity, but have a strong intellectual sensitivity to justice and who may feel that the treatment is disproportionate to the criminal act.^{11b} Normally, however, if the instinct of self-defense is not aroused and the sense of justice is not violated, the treatment of the criminal can be relied upon to act as a deterrent, to some extent at least.

The deterrent treatment of the criminal is, in modern legal systems, destructive, deprivitive or punitive.¹²

Destructive treatment of the criminal is present where all danger from a possible recurrence of the acts of the criminal is made impossible. This can be accomplished by destroying the criminal completely, as by capital punishment; or by destroying that part of him which is directly the instrument of the crime, as cutting of the hands of one who maims another, or the sterilization of those who have been convicted of rape.

Deprivitive treatment is that treatment which takes away from the criminal the things he prizes. The severest form of deprivitive treatment is life imprisonment. I put this under the heading of deprivitive rather than destructive because there is always danger that the criminal may escape from even the most closely guarded prison, and the protection to society afforded by such imprisonment is not absolute. "Life-termers" who escape are usually recidivists.¹³ Any imprisonment, however, is deprivitive because it takes away from the criminal his freedom. In a similar way fines are deprivitive because they take away the property of the criminal. A third form of deprivitive treatment is present when the criminal is compelled to disgorge that which his criminal act has helped him acquire. The return of stolen goods is an excellent example of this type of treatment. The deterrent effect, of course, comes with the realization that such acts are futile, as the activity goes for naught if one is "caught with the goods."

^{11b}Judge M. A. Kavanaugh, *The Adjustment of Penalties*, VII Amer. Bar Asso. Jour. 401.

¹²See for example the Penal Code of North Dakota. Any penal code shows the same thing. Dean Pound says, "Law secures interests by punishment, by prevention, by specific redress and by substantial redress; and the will of man has discovered no further possibilities of judicial action." *The Limits of Effective Legal Action*, an address to the Pennsylvania Bar Association, June 27, 1916.

¹³Ferri, *Criminal Sociology*, page 129, par. 85. Cf. *De Quiros*, *Modern Theories of Criminity*, page 169.

Punitive treatment is that which produces physical and mental pain. Corporal punishment, such as flogging, or mental suffering such as is induced by putting a high-strung female criminal into a dark cell overrun by rats, would be examples of punitive treatment.

The genuinely protective quality of deterrent forms of treatment is open to considerable question.¹⁴ It is a commonplace of criminology that capital punishment does not decrease crime.¹⁵ One wonders concerning the deterrent value of deprivitive measures when the relation between vagabondage and crime is considered and recalls that vagabonds will generally commit some less serious crime late in the fall so that they can assure themselves of food and lodging during the winter months with but little trouble to themselves.¹⁶ Punitive measures appear less efficacious when one remembers that criminals are usually insensitive to pain and lacking in sympathetic imagination.¹⁷ But we leave a fuller discussion of these matters for another occasion. Here we are interested simply to mention the kinds of treatment which the criminal law must note and consider.

In deterrent treatment of the criminal the emphasis is placed upon the relation of the criminal to his acts, and the fact that society is to be protected from the recurrence of similar acts.¹⁸ But in reformative treatment the emphasis is placed upon the relation of the criminal to himself and the possibility of restoring him to a full participation in societal activities and relationships.¹⁹ Not that the deterrent element is, or can be, completely eliminated. The very fact that the criminal is in the custody of the law and that the state finds it necessary to superintend directly the activities of the criminal stamps the criminal as one who is abnormal, and the other members of society are restrained, to some extent at least, from imitating his acts. No one likes to be thought of as abnormal in any way. This is why the sick fight against being sent to hospitals where mental cases only are treated,²⁰ and why in criminal causes the defense of insanity is never consented

¹⁴*Ferri*, Criminal Sociology, Part IV, chapter 5.

¹⁵*Ibid.* pages 530-32. *Lombroso*, Crime, etc., page 426. (Lombroso takes issue with Ferri as to the value of capital punishment.)

¹⁶*Ferri*, *ibid.* page 261 et seq. *Saleilles*, Individualization of Punishment, page 283.

¹⁷*Tarde*, Penal Philosophy, page 64, page 257.

¹⁸See Notes 1, 2, 3, *supra*.

¹⁹This is the basis for the modern development of the system of probation, indeterminate sentence, and the juvenile courts, and such like treatment of delinquents.

²⁰Cf. *Gross*, Criminal Psychology, page 25 et seq.

to by the criminal excepting as a last resort.²¹ That one needs to be controlled, or reformed, or watched in some peculiar fashion stigmatizes one at once. To avoid such stigmata persons will avoid, to some extent, imitating criminal acts. So that reformative treatment is to a varying degree deterrent. But reformative measures are essentially curative. They are therapeutic, not coercive. They assume that the criminal is suffering with some abnormality which can be eradicated; that the criminal can be restored to societal usefulness; that his fear-someness to society can be removed; that the protection to society comes from the restoration of the criminal to normality of thought and action; that when the criminal has been reformed he will present no source of danger to the community of which he may be a part.²²

It is, therefore, obvious that reformative treatment can never be destructive. Destructive treatment eliminates the criminal. Reformative treatment eliminates the dangerous characteristics and tendencies. The two are logical contraries.

But reformative treatment may be deprivative and punitive. Solitary confinement on a bread and water diet for twenty-four hours may be a salutary way of treating a juvenile delinquent. The deprivation of physical freedom cuts off a vent for physical energy and its distractions and creates an opportunity for the delinquent to "think things over," which is often all that the situation demands. The unsatisfied hunger-pangs enforce whatever thinking the confinement may induce.

The efficacy of reformative treatment depends entirely upon the adaptation of the means employed to the physio-psychological characteristics of the criminal.²³ This must never be forgotten. Improper methods tend rather to intensify than to eradicate criminal tendencies.²⁴ If a criminal is supernormally responsive to suggestion it is probably wrong to parole him or place him on probation if he is thereby permitted to return to an environment which reeks of viciousness and immorality.²⁵ The chances that he will yield to destructive suggestions are so great that the purpose of reformative methods is defeated. On the other hand, imprisonment may be wrong if it places a normal person into close, constant and continuous association with vicious persons.²⁶ An example of this would be the imprisonment of a man who

²¹ *Lombroso*, Crime, etc., page 403.

²² *Lombroso*, *ibid.* pages 385-433.

²³ *Lombroso*, *ibid.* 305 et seq.

²⁴ *Ferri*, Criminal Sociology, page 228 seq.

²⁵ *Saleilles*, The Individualization of Punishment, page 215 seq.

²⁶ *Kavanaugh*, The Adjustment of Penalties, VII Amer. Bar Asso. Jour. 401.

in a fit of sudden rage kills his wife's paramour when he finds them together in bed. Contact with hardened criminals does not permit the normal restraining influences to operate. They are non-existent in the average prison.²⁷ Normal social pressure is removed and dangerous social ideas are given an opportunity to impress themselves.²⁸ This is not a reformative thing. It is deformative and destructive. Then, too, as I have already said, punitive measures applied to one who is sub-normally sensitive to pain is ineffective. If the criminal is a hyper-anæsthetic phase of a dissociated personality, such as "Sally" was, in the famous medical case reported by Dr. Morton J. Prince,²⁹ no amount of physical punishment has any effect whatsoever. It is the wrong method of approach to that particular type of criminal.

The proper method of treatment will be psychical or physical. Usually the criminal needs both types of treatment.³⁰ It is rare that some physical defect which contributes to the dangerousness of the criminal is not present.³¹ The physical and physical treatment will be analytic and therapeutic. It is analytic in order that discovery may be made of the evil characteristics which exist and are contributory to criminality, and of the normalizing forces which may be utilized for the rehabilitating of the criminal. It is therapeutic in order that the reformation of the criminal may be brought about. The therapeutic treatment can be applied only after there has been a thorough analysis.³² It is for this reason that every court that deals with criminal cases should have a psycho-pathological laboratory attached to it.³³ Only the existence of such a laboratory can assure the judge that an adequate physical and psycho-analytical examination has been made; and it is only from the results of such a thorough analysis that it can

²⁷Ibid.

²⁸Ibid.

²⁹Dr. J. Morton Prince, "The Dissociation of a Personality" (1906). *Miss Beauchamp*, The Theory of the Psychogenesis of Multiple Personality, 15 Journal of Abnormal Psychology, 67 (1920). "Miss Beauchamp" discusses her own life as a dissociated personality in an interesting article in the Journal of Abnormal Psychology for Oct.-Nov., 1908, and Dec.-Jan., 1909.

³⁰All modern criminologists agree upon this. See the works in preceding notes.

³¹Ibid.

³²Healey, Work of the Judge Baker Foundation, in "Harvey H. Baker, Upbuilder of the Juvenile Court," page 123; "Pathological Lying, Accusation and Swindling" (1917); "Mental Conflicts and Misconduct" (1921); "The Individual Delinquent" (1920).

³³Olson, The Municipal Court of Chicago, 92 Central Law Jour. 81; the Psychopathic Laboratory of the Municipal Court of Chicago, 92 Central Law Journal 102; the Recent History of the Psychopathic Laboratory of the Municipal Court of Chicago, 93 Central Law Journal 132.

be ascertained what kind of therapeutic treatment should be employed.³⁴

Therapeutic treatment is mental or physical. It is mental when various forms of suggestion are used like hypnotism, or personal contacts with normal people, or the removal to environments where only wholesome influences play upon the criminal. It is physical when changes of alimentation are made, or when the economic background of the criminal is shifted, or when excisions are made of parts of the physical organism of the criminal, such as the removal of tonsils, adenoids, foreign growths, or other physical malformations. Therapeutic treatment may even be partially destructive of the person and personality of the criminal, as, for example, when criminals who have uncontrollable impulses to rape are castrated or otherwise made sterile. Such therapeutic treatment is strongly deterrent. I do not know of any statistics bearing upon this matter, but I venture the opinion that if castration were made the punishment for rape there would be a diminution in the number of rapes committed. There is something almost uncanny about the deterrent effect of a threat to render impotent the procreative instinct. Of course, those who commit rape because of genuine irresistible impulses will not be deterred, but all others will.

The second general question which the criminal law must consider appertains to the criminal act. This act is accomplished; nothing can wipe it out. The question is, therefore: What are the affective qualities of the criminal act and how can they be neutralized or utilized? The affective qualities play upon the criminal, other members of society and the state (if we look upon the state in this connection as being those who are under the duty to detect and prevent crime).

The result of the act upon the criminal are physio-psychological. The mere fact that the criminal has done the act predisposes him a repetition of the act.³⁵ A physiological change has taken place in his brain-cortex. As the psychologists put it: "Every psychosis has its neurosis."³⁶ And though it does not follow that every neurosis will have its psychosis interminably, still there is the psychological tendency to make the neurosis expressive. The doing of the act is conducive to its repetition.

The psychological affective qualities of the act may be liberative,

³⁴Ibid.

³⁵Pillsbury, *Essential of Psychology*, page 40.

³⁶Ibid., also *Woodworth, Psychology*, page 57 et seq.; *Angell, Psychology*, pages 40-56.

inhibitive, creative or repetitive. The act may free the criminal from the emotional stress which produced it. A man who kills another in a blind rage "comes to" with a shock and wonders how he could have acted as he did. The epileptic criminal is freed from the mental disturbances and pressures which always precede the criminal activity.³⁷ The otherwise normal delinquent is no longer under the impulsive power of the "sex complex" or other "repression," the avoidance of which drives him to the criminal act.³⁸ This liberative quality may be, of course, permanent or temporary. If it is permanent, then the law need no longer consider it. The danger from the act through this channel is gone and no protection is needed against a non-existent or spent emotion. But if the emotion has only been temporarily expressed or aborted this affective quality of the act must be eradicated by proper treatment.

The act may be inhibitive. That is, it may prevent normal thought processes from functioning. The person who murders another, for example, may become so obsessed with the thought that he can think of nothing else. If he is of a religious turn of mind and believes in the eternal damnation of all murderers, then not only is he infected with, but he actually becomes, a "fixed idea."³⁹ Nothing he can do will be of any avail. The motives for action of any kind are gone. He ceases to function in any way. All of his powers are inhibited. This inhibition is the direct result of the act. The reformatory treatment of the criminal must start with the removal of this fixed idea, while the knowledge that the act has resulted in the establishment of this inhibition will have some deterrent effect upon others.

The act may be creative. That is, it may start a series of activities which are lawless. For example: X is a mental defective. He has been badgered by a group of boys. On his way he is teased by Y. Hitherto when Y has teased him, or any of the other members of the group to which Y belongs have teased him, X has wept and run away. This time, however, X in a sudden fit of rage picks up a brick and crushes Y's skull. Then, seeing his success against Y, X determines to rid himself once and for all of the teasing by the other members of the group. He therefore sets out to find the others and assaults them. Here the criminal act has destroyed the inhibitions of fear and created the feeling of competency of mind and body which starts X

³⁷*Jacoby*, *The Unsound Mind and the Law*, page 14.

³⁸See the works on psycho-analysis by Freud, Jung and Coriat. Dr. Wm. Healey has made extensive use of psycho-analysis in his work with juvenile delinquents under the Baker Foundation in Boston, Mass. Cf. note 32, *supra*.

³⁹*James*, *Varieties of Religious Experience*.

off on a criminal rampage. I have put the case of a mental defective, but such activities are not confined to mental defectives. Anyone who has spent several months at a time in a mining or lumber camp can recall that just such an event developed when there was someone who for a long time had been the butt of the rough jokes of the lumbermen or miners.

The act may be repetitive. The criminal may obtain such emotional relief from the act that he continues to repeat that act for the sake of the emotional satisfaction he experiences. When X stabs Y to the heart, killing him instantly, and then continues to stab the dead body we have such a repetitive act.

The effects of the criminal act upon the other members of society are psychological. They are stimulative or repulsive. If the act evokes imitation, it is stimulative. When newspapers "feature" a suicide or a spectacular crime there follows usually a series of like criminal act.⁴⁰ Certain individuals are psychologically in such a state that they are set off by knowledge of the original criminal act and they imitate that act.⁴¹ There is an increasing number of juvenile delinquencies which are traceable either to newspaper headlines or the "movies." Seeing the thing done, or learning that it has been done, starts the imitative impulse and like crimes are committed.

Upon others, however, the criminal act may operate repulsively. It may arouse aversions or shock the sense of justice so that all of the impulses are against the commission of the act. A recent episode in a police court shows the truth of this idea. Several young men were arraigned on the charge of assault and rape. One of them pleaded not guilty to both the assault and the rape. He acknowledged he had intended taking part in both, but insisted that the others had taken hold of the woman first; that she had fainted, and the effect upon him of the assault was to arouse his pity and sense of decency, and he had gone to the rescue of the girl when the police, attracted by her former screaming, broke in and arrested him. Here the repulsive power of the criminal act was stronger than its stimulative power.

The affective quality of the criminal act upon the state is provocative. It initiates investigation and attempts at the apprehension and conviction of the criminal. A crime that is peculiarly vicious or frightful may evoke some special feelings of interest, but in the main the act simply starts the apprehending and convicting machinery going. It has a mechanical and not a psychological effect.

⁴⁰*Lombroso, Crime, etc.*, pages 209 et seq.

⁴¹*Ibid. Ross, Social Control*, pages 156-57.

It is at this point that all the problems of procedure emerge. A discussion of these problems I shall leave for another time. It is enough here to note that it is the act which gives the occasion for the operation of criminal proceedings. This does not mean that the act determines the kind and quality of the proceedings. Far from it. They are really to be determined by the social interest in the suppression or reformation of the criminal and the protection of the state. But the criminal act sets the criminal procedure in motion.

Not only the criminal and his act but also the consequences of the act must be considered by the law. By consequences I mean the results of the act. Some of these we have considered when discussing the act itself. But these flowed almost directly from the act, as, for example, the liberative effect of assault. But there are other consequences which are secondary. That is, there may be external results from which other external or internal results may come. For example: X kills Y. The act of killing has its effects, which are in truth consequences of the act, but the act of killing results in having a dead body of Y in existence. The death of Y, which is the outcome of the killing, will also influence the criminal and society. It is these latter results which I wish to call consequences, so as to distinguish them from the results which flow directly from the act itself.

The first great consequence is that the victim of the criminal act has been deprived of his life or has been injured as to person or property. This means that the state has failed to fulfill its function of protecting its members. As a consequence of this the victim loses his respect for law and voicing this loss results in the spread of disrespect for law and a consequent increase of lawlessness.⁴² Dangerous elements in society, feeling that the restraining force of law and order is weak, proceed to take advantage of its weakness and crime increases. This is what is really meant when it is said that "a crime wave" exists. Self-respecting and ordinarily law-abiding citizens, fearful that they will not be protected by their protecting agency, the state, decide to take protecting measures themselves.⁴³ If such measures are in the nature of carrying defensive arms, and such carrying is forbidden by law, the consequence of the original crime is that law-abiding citizens become criminals in the attempt to avoid becoming victims of crimes similar to the original crime. That is, the failure to protect society from criminal acts leads to an increase of criminal acts on the part of those who would ordinarily not be criminals. The stabilizing effect of

⁴²*Lombroso, Crime, etc.*, pages 212-225.

⁴³*Ibid.*

the legal ordering of society is gone. Primitive methods of self-help are revived at least temporarily. They remain until the state makes its protecting powers apparent and effective again. Such apparent effectiveness will be regained only if criminal procedure is impartial, swift and certain in its results.⁴⁴ A crime wave shows that the criminal procedure is inadequate to fulfill the function of the state as the protector of the social organization. The criminal act, then, has as a consequence the spreading of information that the protecting agencies are insufficient. The criminal law must take cognizance of this consequence and counteract it. This means that criminal surveys of all communities must be undertaken in order that more effective methods for the protection of society will be devised. Seeing the law in action determines whether the law on the statute books is effective.⁴⁵ The character of the recurring activities of those who had been convicted of crimes, punished and returned to societal relationships will indicate whether the deterrent and reformative measures adopted are sufficient for their purposes. It is here that the value of such methods as probation, indeterminate sentence, suspended sentence, and parole can be ascertained. The value and effectiveness of the psychopathic clinic is here determined. The criminal law is vitally concerned with such matters. They are part of the social aspects of crimes. It, therefore, becomes most obvious that the criminal law does not consist merely of certain sections of criminal codes or certain rules of the common law. All things connected with whatever causes crime and with whatever will aid in preventing or destroying crime is a part of the criminal law. To label investigations into the causes and prevention of crime as sociology, or philosophy, or psychology, or economics, and by thus labeling them exclude them from the domain of the criminal law, is both silly and futile.⁴⁶ The function of the criminal law is to protect society. If such protection cannot be given unless the criminal law is sociological, psychological, philosophical and economic in nature, then the criminal law must develop that nature. Those who deal with the criminal law in any capacity, be it as lawyer, judge or prison warden, must look upon the criminal law as a method of social engineering for the purpose of protecting society.⁴⁷ A knowledge of the criminal code and the ability to distinguish with technical finesse one crime from another is useful knowledge; but it is not all the knowledge which is

⁴⁴*R. H. Smith*, Cleveland's Crime Survey, 5 *Journal of the American Judicature Society*, 68, 69.

⁴⁵*Pound*, Law in Books and Law in Action, 44 *Amer. Law Rev.* 12-36.

⁴⁶*Pound*, Future of the Criminal Law, 21 *Columbia Law Rev.* 1.

⁴⁷*Pound*, A Theory of Social Interests, 15 *Proceedings of the American Sociological Society*, May, 1921.

requisite for an adequate understanding and administration of the criminal law. Inadequate information means inadequate methods of protection and this means failure to fulfill the purpose for which the criminal law was devised.

The societal aspects of the criminal law are economic, sociological, psychological and philosophic. The criminal law must be administered with due regard to these aspects. The state can fulfill its function of protecting society only when it understands the nature of societal aspects of the criminal law and administers it accordingly.⁴⁸

⁴⁸*Pound*, The Future of the Criminal Law, 21 Columbia Law Rev. 1.